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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MIKAEL H. STAHLE,

Plaintiff and Appellant,

v.

NETWORK SOLUTIONS, INC.,

Defendant and Respondent.

B161499 c/w B164039

(Los Angeles County
Super. Ct. No. BC243476)

Appeal from orders of the Superior Court of Los Angeles County. Wendell R. Mortimer, Jr., Judge. Order dated July 17, 2002 (B161499) affirmed. Order dated November 15, 2002 (B164039) affirmed with directions.

Arias, Ozzello & Gignac, Mark Arias, Mark A. Ozzello, Arnold C. Wang and J. Paul Gignac for Plaintiff and Appellant.

Arnold & Porter and Suzanne V. Wilson for Defendant and Respondent.

These appeals arise out of a class action suit brought by plaintiff Mikael Stahle (Stahle), against Network Solutions, Inc. (NSI), an Internet-service provider, for damages, restitution, and injunctive relief based on unlawful, unfair or fraudulent business practices (Bus. & Prof. Code, § 17200 et seq., UCL), fraudulent concealment, and violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq., CLRA). Stahle claims that NSI misled its customers as to the nature of its registration fees to register domain names on the World Wide Web. While Stahle believed that there was no charge for the registration service if he decided not to retain the domain name, fees for the registration services actually were owed upon registration. When NSI attempted to collect registration fees from Stahle, he brought this action individually and on behalf of other NSI customers who received collection notices. In a series of pretrial rulings, the trial court denied a motion to certify the class, dismissed Stahle's non-CLRA claims, and granted summary adjudication in favor of NSI on Stahle's CLRA claim.

Stahle appeals from the denial of the motion to certify the class. He contends his fraud and CLRA claims satisfied all the requirements for class certification, but the trial court used improper criteria in considering the merits of those claims when it denied the motion. We disagree and affirm the order.

Stahle also appeals from the dismissal of his non-CLRA causes of action for forum non conveniens based on the mandatory forum selection clause in NSI's registration agreement, and summary adjudication of his CLRA claim on the ground that he was not a consumer within the meaning of that Act. Finding no error, we affirm.

INTRODUCTION

NSI provides domain name registration services to the public in certain top-level domains on the Internet, including ".com," ".net," and ".org," from its headquarters and principal place of business in Virginia. Because domain names are associated with unique Internet protocol numbers that allow computers connected to the Internet to communicate, each domain name must be unique. Thus, a domain name can be registered to only one entity. From 1992 through mid-1999, NSI was the exclusive registry of domain names in the top-level domains. It was also the exclusive registrar of top-level domain names.

NSI received domain name registration applications electronically via e-mail. The electronic format of the registration agreement required the registrant to electronically scroll through the agreement in order to accept its provisions and obtain the registration. The registration agreement was then submitted to NSI to determine if the domain name requested was available. If the requested name were available, then it would have been registered in NSI's domain name database and assigned to that registrant. Up until 1999, NSI would accept the registration and then send an invoice to the registrant for the registration fee as set out in the terms of the registration agreement.

In March 1999, NSI lost its exclusive right to register domain names. The Internet Corporation for Assigned Names and Numbers (ICANN) assumed responsibility for overseeing the transition from an exclusive registrar system to a multiple registrar system. Beginning in June 1999, ICANN required all registrars to obtain registration fees at the time of registration Because NSI had previously invoiced registrants to collect

registration fees, ICAAN gave NSI time to transition to the new payment system and to collect the unpaid registration fees.

During the class period (prior to April 2000), NSI's policy of register first, pay later, was set forth in its registration agreement. The first paragraph of the registration agreement provides: "This domain name registration agreement ('Registration Agreement') is submitted to NETWORK SOLUTIONS, INC. (NSI) for the purpose of applying for and registering a domain name on the Internet. If this Registration Agreement is accepted by NSI, and a domain name is registered in NSI's domain name database and assigned to the Registrant, Registrant ('Registrant') agrees to be bound by the terms of this Registration Agreement and the terms of NSI's Domain Name Dispute Policy ('Dispute Policy') which is incorporated herein by reference and made a part of this Registration Agreement. This Registration Agreement shall be accepted at the offices of NSI."

The fees and payments provision of the registration agreement provided in part: "Registrant agrees to pay a registration fee of Seventy United States Dollars (US$70) as consideration for the registration of each new domain name . . . [¶] [p]ayment is due to Network Solutions within thirty (30) days from the date of the invoice." Additionally, the registration agreement provided: "By completing and submitting this Registration Agreement for consideration and acceptance by NSI, the Registrant agrees that he/she has read and agrees to be bound by [the provisions] above."

In early 2000, during its transition period, NSI attempted to collect unpaid registration fees. NSI retained a collection agency that successfully sent e-mail notices to

approximately 42,000 registrants, who had failed to pay registration fees. This collection effort lasted two weeks, and NSI took no further steps to collect these unpaid registration fees.

FACTUAL AND PROCEDURAL BACKGROUND

Stahle registered domain names with NSI. He received a collection notice for unpaid registration fees for 23 domain names that he registered in October 1999. He filed this action on behalf of himself and all others similarly situated who received collection notices, alleging that the collection efforts were unlawful and that the class members were damaged as a result of those efforts.

1. *Stahle's First Amended Complaint*

The first amended complaint alleged three causes of action by Stahle individually, and as a representative of the putative class, for a violation of the UCL, fraudulent concealment, and a violation of CLRA.

Stahle's first amended complaint alleged: In October 1999, Stahle registered 16 domain names with NSI.[1] NSI's policy was to allow a registrant to register the domain name and then bill the registrant for the registration fee. If the registrant did not pay the registration fee within 30 days of the date of the invoice, NSI deleted the registration and the domain name reverted back into the public domain. If the name returned to the public domain, NSI would not assess registration fees. NSI informed the general public that the

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[1] Evidence submitted in support of, and in opposition to, the class certification motion showed that Stahle actually registered 23 names for which NSI sought to collect registration fees.

registrant did not have to pay the invoice if he or she did not want to retain the domain name. Because Stahle did not want to retain all the domain names he registered, he did not pay the registration fees.

At some point, NSI's payment policy changed. NSI then sought to collect unpaid registration fees, even though the registrants had not been informed of the change in the policy. Stahle received a demand letter requesting payment of registration fees for the domain names he registered in October 1999. NSI's effort to collect these registration fees deceived him and the general public, and NSI fraudulently concealed its change in policy to collect registration fees for registering domain names.

Stahle alleged that the class consisted of NSI customers nationwide, and a subclass of California residents, who had received the collection notices.

2. *The Trial Court Denied Stahle's Motion for Class Certification*

After NSI answered the first amended complaint, Stahle moved to certify the fraud and CLRA claims as class actions, asserting the lawsuit was properly maintained on behalf of the class and subclass. The class included all persons nationwide who "[r]egistered domain names through Defendant Network Solutions, Inc., prior to April 2000, decided to not retain the said domain names, were billed for such registrations by Defendant Network Solutions, Inc., and who paid or did not pay for such domain names after collection activity was initiated against them." The subclass included "all persons who are residents of California, who registered domain names through Defendant Network Solutions, Inc., prior to April 2000, decided to not retain the said domain names,

were billed for such registrations by Defendant Network Solutions, Inc., and who paid or did not pay for such domain names after collection activity was initiated against them."

Declarations, deposition excerpts, and exhibits offered in support of the class certification motion reflected the following:

Stahle registered domain names through NSI beginning in July 1999. He received invoices for the registration fees. Because he decided not to keep certain domain names, Stahle stated in his declaration that he phoned an NSI representative, who informed him that he did not have to pay the registration fee. If he did not pay the registration fee, then the domain name that he had registered simply would revert back to the public domain. Stahle also submitted a print out of a page from NSI's Web site that stated: "6. What happens if I don't pay? [¶] Under normal conditions, if payment is not received by the due date, the Web Address is subject to deactivation and deletion." In reliance on the statements posted on NSI's Web site and NSI's representative's statements, Stahle stated that he did not pay for certain domain names.

On April 20, 2000, Stahle received an e-mail collection notice from the collection agency NSI hired to collect unpaid registration fees. According to the collection agency, Stahle registered 23 domain names but did not pay the registration fees. Even after receiving the collection notice, Stahle did not pay the registration fees.

According to Stahle's attorney, the class Stahle purported to represent included 53,365 people who registered domain names and received collection notices. The subclass included 50 California residents who, like Stahle, received collection notices.

The substance of NSI's opposition to the certification motion was that Stahle's claims were not typical of the class (and subclass) he sought to represent because he could not allege damages, an essential element of the fraud and CLRA claims. Additionally, NSI argued that the remaining requirements of a class action were not satisfied. Moreover, NSI argued that the benefits of proceeding with the class action were negligible because NSI had halted the collection efforts. In support of its opposition, NSI offered evidence of the following:

From July 1999 through December 1999, Stahle registered 282 domain names with NSI. Pursuant to the terms of the registration agreement, NSI registered the domain names immediately and then mailed Stahle an invoice demanding payment of the registration fee. These invoices enclosed a copy of the registration agreement that stated payment was due within 30 days. Stahle did not pay the registration fees for 276 of the domain names that he registered during this time period, which included the domain names he registered in October 1999.[2]

Stahle testified that the 23 domain names he registered in October 1999 were for future business purposes[3] or in connection with his law practice.

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[2] Stahle objected to portions of the declarations submitted by NSI as irrelevant on the ground that the class certification inquiry should not consider the lawsuit's merits and should be limited to the complaint, his declaration, and his testimony. The trial court overruled the objections.

[3] Stahle testified as follows: "Q. Can you recall why you were registering any other domain names? [¶] A. Same reasons, exact same reasons that I just stated. [¶] Q. In connection with – [¶] A. Ideas. I would have an idea and I wanted to see if certain names would be available that I thought might be appropriate. [¶] . . . [¶] Q. Were most of these

Stahle initially testified that he had not suffered any monetary damages resulting from NSI's collection efforts. Stahle, however, modified his answer by testifying that he had paid for a copy of a credit report to ascertain whether NSI had reported his debt. Stahle never produced a copy of the credit report after repeated requests to do so.

NSI's collection efforts lasted two weeks, ending on April 26, 2000. Since that date, NSI has made no further effort to collect unpaid registration fees for domain names registered during the class period.[4]

While NSI's collection agency sent out approximately 47,782 e-mail collection notices, it collected money from only 268 registrants. Of those 268 people, only 183 have addresses in the United States, and only 18 have addresses in California.

Based on the evidence submitted by both parties, the trial court denied Stahle's motion. It concluded that Stahle's claims were not typical of the class or subclass because he (1) did not pay any registration fees after he received the e-mail and suffered no monetary damage from the allegedly unlawful practice, and (2) was not a consumer within the meaning of CLRA. In addition, the trial court concluded: individual issues predominated over class issues; the class failed to meet the numerosity requirement because there were only 18 California residents who responded to the collection notices;

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ideas related to, I guess potential Internet business – [¶] A. Yes, I think so, yes. [¶] . . . [¶] Q. So in connection with potential Internet business ventures? [¶] A. Yes."

[4] NSI, however, filed a cross-complaint against Stahle to recover the unpaid registration fees.

the benefit to proceed as a class was negligible; and the request for injunctive relief was moot because NSI had ceased its collection efforts.

3. *The Trial Court Granted NSI's Motion for Forum Non Conveniens*

After the trial court denied class certification, NSI brought a motion to dismiss Stahle's non-CLRA claims (fraud and UCL) pursuant to Code of Civil Procedure section 410.30[5] on the basis of the mandatory forum selection clause in the registration agreement.

The forum selection clause provides that disputes arising under the registration agreement shall be governed by Virginia law. The clause further provides: "By submitting this Registration Agreement, Registrant consents to the exclusive jurisdiction and venue of the United States District Court for the Eastern District of Virginia, Alexandria Division. If there is no jurisdiction in the United States District Court for the Eastern District of Virginia, Alexandria Division, then jurisdiction shall be in the Circuit Court of Fairfax County, Fairfax, Virginia."

In support of the motion, NSI presented evidence that Stahle had completed the registration agreement for the domain names subject to the collection notice, and NSI confirmed that it had registered those names. Stahle presented no evidence in opposition. Instead, he argued that the registration agreement was not a valid contract because NSI

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[5] Code of Civil Procedure section 410.30 provides in part: "(a) When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

had the unilateral right to perform or withdraw from the agreement. Stahle further argued that NSI had failed to demonstrate that Virginia was a suitable alternative forum.

The trial court granted NSI's motion to dismiss, concluding that Stahle's non-CLRA claims were "subject to a fully disclosed mandatory forum selection clause where plaintiff agreed to litigate these claims in the state and federal courts of Virginia."

4. *The Trial Court Granted NSI's Motion for Summary Adjudication of Stahle's CLRA Cause of Action*

Concurrently with its motion to dismiss, NSI filed a motion for summary adjudication of Stahle's CLRA cause of action pursuant to Code of Civil Procedure section 437c, subdivision (f)(1). Relying on Stahle's deposition testimony, NSI argued that Stahle was not a "consumer," nor had he suffered damages, both necessary requirements to maintain a CLRA claim. Stahle opposed the motion, claiming that there were triable issues of fact as to whether he could assert a CLRA claim. In addition, he asserted that under CLRA, because this action was commenced as a class action, summary adjudication was procedurally improper.

The trial court granted the motion, concluding that Stahle had failed to demonstrate a triable issue of fact that he registered the domain names with NSI as a consumer, as that term is defined under the CLRA.

5. *Stahle Timely Appealed the Trial Court's Orders*

Following denial of his class certification, Stahle timely appealed (B161499). Stahle also timely appealed the trial court's order dismissing his non-CLRA claims and

granting summary adjudication of his CLRA claim (B164039).[6] We consolidated these appeals and issue one opinion.

CONTENTIONS

Stahle contends the trial court's orders must be reversed. First, Stahle asserts that the trial court erred in denying his motion for class certification because his fraud and CLRA claims satisfied all the requirements for class certification, but the trial court's decision improperly addressed the merits of his claims.

Second, Stahle contends that his UCL and fraud claims were improperly dismissed based on the mandatory forum selection provision in NSI's registration agreement for the following reasons: (1) the registration agreement is illusory because NSI does not have a definitive obligation to perform; and (2) the alternative forum is not a suitable one.

Third, Stahle contends that the trial court erred in granting summary adjudication on his CLRA claim because the statute excludes summary adjudication under Code of Civil Procedure section 437c on CLRA actions commenced as class actions. Thus, according to Stahle, even though this action was not certified as a class action, because it was *commenced* as a class action, summary adjudication was procedurally improper.

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6 At the outset, we deal with a procedural issue affecting appealability. The denial of class certification, and the dismissal of an action on the ground of inconvenient forum are appealable orders. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*); Code Civ. Proc., § 904.1, subd. (3).) An order granting a motion for summary adjudication, however, is not an appealable order; the appeal should be taken from the judgment. (Code Civ. Proc., § 904.1 subd. (a)(1).) But because the trial court's order granting summary adjudication as to the CLRA cause of action "effectively disposed of the case," we will construe the appeal as taken from the judgment. (*Belio v. Panorama Optics, Inc.* (1995) 33 Cal.App.4th 1096, 1101-1102.)

DISCUSSION

1. *The Trial Court Did Not Abuse its Discretion in Denying Stahle's Motion for Class Certification*

a. *Motion for Class Certification Standard of Review*

As the proponent of the class action, it was Stahle's burden to establish the propriety of class certification. (*Linder*, *supra*, 23 Cal.4th at pp. 435-436.) The trial court has great discretion in ruling on a motion for class certification, and its decision will not be disturbed on appeal if it is supported by substantial evidence, unless it was based upon improper criteria or erroneous legal assumptions. (*Id*. at pp. 435-436.) Based on this standard, while we ordinarily are not concerned with the trial court's reasoning, on appeal from the denial of class certification, we must focus on the trial court's reasons for its decision. " ' "So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld." [Citations.]' [Citation.]" (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 655 (*Caro*); see also *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828-829.) Thus, we must determine whether the trial court's legal analysis was a correct one. "Any valid pertinent reason stated will be sufficient to uphold the order. [Citation.]" (*Caro, supra,* 18 Cal.App.4th at p. 656.)

The question of class certification is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder*, *supra*, 23 Cal.4th at pp. 439-440.) Thus, the trial court considering class certification cannot consider the legal or factual merits of the case. (*Id*. at pp. 440-443.) But if the evidence presented on

the question of class certification is relevant to the merits of the action, the trial court nevertheless may consider it in ruling on class certification. (*Caro*, *supra*, at p. 656; see also *Linder*, *supra*, 23 Cal.4th at p. 443.)

Based upon these established guidelines, we conclude that the trial court used proper criteria when concluding that Stahle could not establish that his claims were typical of those of an ascertainable class.

b. *Requirements of a Class Action*

Code of Civil Procedure section 382[7] "authorizes class suits in California when 'the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.' " (*Linder*, *supra*, 23 Cal.4th at p. 435.)

In general, in order to obtain class certification, a party must demonstrate that an ascertainable class exists and that there is a "well-defined community of interest among class members." (*Linder*, *supra*, 23 Cal.4th at p. 435; *Bartold v. Glendale Federal Bank*, *supra*, 81 Cal.App. 4th at p. 828.) An ascertainable class is one that can be described by a set of common characteristics sufficient to allow members of that group to identify themselves based upon that description. (*Bartold*, *supra*, 81 Cal.App.4th at p. 828.) The

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[7] Code of Civil Procedure section 382 provides: "If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

community of interest requirement involves three factors: " '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' " (*Linder*, *supra*, 23 Cal.4th at p. 435.) Other factors include the probability class members will come forward to prove their claims and whether certification of the class would serve to deter and redress the alleged wrongdoing. (*Ibid*.)

There are specific requirements to bring a class action under CLRA. These are: "(1) It is impracticable to bring all members of the class before the court. [¶] (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members. [¶] (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. [¶] (4) The representative plaintiffs will fairly and adequately protect the interests of the class." (Civ. Code, § 1781, subd. (b).) Thus, to proceed as a class action on the fraud and CLRA causes of action, Stahle had to show that his claims were typical of the class and subclass. Stahle failed to establish this class requirement.

c. *The Trial Court Did Not Consider the Merits of Stahle's Claims In Denying Class Certification*

Relying on *Linder*, *supra*, 23 Cal.4th 429, Stahle argues that the trial court used improper criteria in denying his motion for class certification because it impermissibly assessed the merits of his lawsuit when considering whether his claims were typical of those of the class. We disagree.

While *Linder*, *supra*, 23 Cal.4th at pp. 439-443, distinguishes between the impropriety of determining whether the putative class can state a cause of action, it does not bar the court from determining whether the requirements to certify a class have been met. As the *Linder* court states: "Nothing we say today is intended to preclude a court from scrutinizing a proposed class cause of action to determine whether, assuming its merit, it is suitable for resolution on a classwide basis. Indeed, issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses. [Citations.]" (*Id*. at p. 443.)

Here, the requirements of a class action, namely whether Stahle's claims were typical of the class he sought to represent, were enmeshed with the merits of the case. The trial court was not precluded from considering evidence bearing on the requirements of class determination simply because that evidence also was relevant to the merits of the lawsuit. (Code Civ. Proc., § 382; Civ. Code, § 1781, subd. (b).)

d. *Stahle's Claims Were Not Typical of An Ascertainable Class*

Stahle attacks the trial court's conclusion that his claims were not typical of the class and subclass. Stahle argues that the trial court impermissibly redefined the class and subclass, then based upon an intrusion into the merits, determined that because he could not establish damages or that he was a consumer within the meaning of CLRA, his

claims were not typical of the redefined class.[8] We reject Stahle's argument. Based upon substantial evidence in the record, the trial court properly determined that the class Stahle purported to represent was not an ascertainable one. When that class had been redefined, Stahle's claims were not typical of the putative class and subclass.

A plaintiff seeking to maintain a class action must be similarly situated to the members of the class he claims to represent. (*Caro*, *supra*, 18 Cal.App.4th at pp. 662-663.) There can be no class certification unless the trial court determines that similarly situated persons have sustained the same or similar damage. (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 72-73; see also *Caro*, *supra*, 18 Cal.App.4th at p. 664.) Put another way, " 'The universal rule is, that an act, however erroneous, which does no injury to a party, cannot be the subject of legal complaint on his part.' Equally fundamental is the legal standard which imposes on plaintiff the burden of proving his damage, an element of his cause of action. [Citation.] If a plaintiff cannot meet these

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8 Under either claim, Stahle had to allege damages. " '[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. [Citation.]' [Citation.]" (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 131, fn. 9; see also Civ. Code, § 1710, subd. (3) ["The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; . . ."].)

Under the CLRA, Stahle had to show that he was a consumer and had suffered damages. (Civ. Code, § 1780, subd. (a). ["Any consumer who suffers any damage as a result of . . . a method, act, or practice declared to be unlawful by Section 1770 may bring an action . . . ."].)

legal prerequisites, no cause of action exists. If multiple plaintiffs fail to meet these elementary standards, no ascertainable class exists." (*Collins*, *supra*, 187 Cal.App.3d at p. 72.)

As defined, Stahle's class and subclass were not ascertainable because the members did not suffer the same or similar damage. The class and subclass included all persons nationwide and in California who registered domain names through NSI before April 2000, and who received collection notices for registration fees. This definition is flawed because those who received collection notices, however erroneous, did not suffer damage if they, like Stahle, did not pay the fees. The trial court properly redefined the class to include those NSI customers who received the collection notices and paid the fees because the evidence showed that such a redefined class would have been ascertainable, as the redefined class suffered the same or similar damage.

There is no merit to Stahle's argument that the trial court erred in redefining the class because it focused solely on damages and ignored that the first amended complaint also sought injunctive relief to prevent further efforts at collecting the unpaid registration fees. The evidence showed that NSI ceased collection efforts except for the individual claim asserted against Stahle.

Having properly redefined the class, the trial court found that Stahle's claims were not typical of the class or subclass he sought to represent because he did not pay the registration fees in response to NSI's collection efforts. Substantial evidence supports the trial court's decision.

The representative plaintiff of this putative class action must have responded to the collection notices and paid the registration fees. Stahle admittedly did not do so and could not represent the class or subclass. (*Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 146. ["It is the fact that the class plaintiff's claims are typical and his representation of the class adequate which gives legitimacy to permitting him to bind class members who have notice of the action. [Citations.]"].)

Although Stahle claims he suffered damages, he has not demonstrated that his claim of damages, namely, the cost of a credit report he purportedly paid for, were typical of the class. Although differences in computing damages are not sufficient to deny class certification, differences in the manner of incurring damages, as is the case here, are an appropriate consideration. (See *Caro*, *supra*, 18 Cal.App.4th at p. 665.) Here, the trial court necessarily considered the difference between Stahle's cost to obtain a credit report and the payment of registration fees, and correctly concluded that Stahle's damage claim was not typical of the class he sought to represent in the fraud class action.

Likewise, there was substantial evidence in the record to support the trial court's determination that Stahle's claims were not typical of putative class members' claims under CLRA. (Civ. Code, § 1781, subd. (b)(3).) The trial court found that based on Stahle's deposition testimony, in which he admitted to registering the names for business purposes, he was not a consumer under CLRA.

CLRA defines a consumer as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." (Civ. Code, § 1761, subd. (d).) By its very terms, CLRA does not apply here because Stahle admitted

that he registered the domain names for future business use or for his law practice.[9] (Cf. *California Grocers Assn v. Bank of America* (1994) 22 Cal.App.4th 205, 217 [grocers' association is not a consumer under Civil Code section 1761, subdivision (d)].)

Without citation to authority, Stahle attempts to draw a distinction between an individual who registers domain names to pursue his own business as opposed to someone who does so on behalf of a business entity acting within the course and scope of his employment. Stahle concedes the latter is not acting as a consumer for purposes of CLRA, but not the former. We see no distinction. Stahle admitted that he was registering the domain names for business purposes. That is sufficient to show that his claims are not typical of the putative class members of consumers under CLRA.

We reject Stahle's assertion that the trial court should have allowed a consumer plaintiff to intervene in this action. Not only was this issue raised for the first time in Stahle's reply brief, but he failed to raise this point in the trial court. He therefore has waived it. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."]; *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117 ["It is well established that issues or theories not

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[9] NSI asserts that in addition, the registration of a domain name is not a good or service as defined by the CLRA. We need not decide that issue, having concluded that Stahle was not a consumer within the meaning of Civil Code section 1761, subdivision (b).

properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal."].)[10]

Because the trial court's proper determination that Stahle's claims were not typical was alone sufficient to defeat class certification of the fraud and CLRA causes of action, we need not consider whether substantial evidence supports the trial court's decision on the remaining class action requirements. Moreover, because the class requirements have not been established, we need not consider the potential benefits of maintaining the fraud and CLRA claims as a class action.

2. *The Trial Court Did Not Abuse Its Discretion by Enforcing the Mandatory Forum Selection Clause in the Registration Agreement*

a. *Motion to Dismiss Standard of Review*

A forum selection clause is valid if the parties contractually agreed to it unless the party resisting its application shows that enforcement of the clause would be unreasonable. (*Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 587-588; *Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1457.)[11] "We review a

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[10] In support of this argument, Stahle cites *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 142, in which the putative class representative conceded he did not rent his car as a "consumer" as that term is defined in Civil Code section 1761, subdivision (d). Rather than deny certification, the trial court had discretion to permit intervention. Here, had Stahle raised the issue, the trial court might have exercised that discretion. But because Stahle did not raise the point at the trial court, we do not consider it here.

[11] We note that the registration agreement contains a choice of law provision that it be interpreted in accordance with the laws of the Commonwealth of Virginia. Virginia, like California, has held that forum selection clauses should be enforced unless it would

trial court's decision to enforce a forum selection clause for an abuse of discretion." (*Lu v. Dryclean-U.S.A. of California, Inc*. (1992) 11 Cal.App.4th 1490, 1493; *Furda v. Superior Court* (1984) 161 Cal.App.3d 418, 424.) This is what we have done here and conclude that the trial court did not abuse its discretion in dismissing Stahle's non-CLRA causes of action based on the mandatory forum selection clause in the registration agreement.

b. *The Registration Agreement is a Binding Contract*

Stahle attempts to avoid the mandatory forum selection clause in the registration agreement on the grounds that the agreement is not a valid and enforceable contract. He advances two arguments. First, Stahle argues the registration agreement is illusory based on the "right-of-refusal" provision,[12] because NSI had no definitive obligation to perform. Second, Stahle argues that because the registration agreement does not specifically state what constitutes acceptance of the contract, its terms are not specific. Neither argument has merit.

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be unfair or unreasonable to do so. (*Paul Business Systems, Inc. v. Canon U.S.A., Inc.* (1990) 240 Va. 337, 342-344 [397 S.E.2d 804, 807-809].) Thus, on this issue the application of Virginia law would not make the slightest difference. Since both Stahle and NSI cite only California cases, and there is no conceivable prejudice to either party, we will decide this issue based on California law.

[12] That provision states: "Right of Refusal. NSI, in its sole discretion, reserves the right to refuse to approve the Registration Agreement for any Registrant. Registrant agrees that the submission of this Registration Agreement does not obligate NSI to accept this Registration Agreement. Registrant agrees that NSI shall not be liable for loss or damages that may result from NSI's refusal to accept this Registration Agreement."

(1) *The Registration Agreement is not Illusory*

Stahle incorrectly reads the right-of-refusal provision as NSI's unqualified right to cancel or withdraw from the registration agreement. The second sentence of the provision qualifies the refusal or withdrawal right as limited to acceptance of the registration. NSI cannot accept the registration (or offer) until it determines that the domain name is available. When NSI does so, it accepts the registration agreement by registering the domain name in its database and assigning it to the registrant. At that point, pursuant to the registration agreement, the registrant and NSI agree to be bound by the terms of the registration agreement. There is no lack of mutuality. Once NSI accepted the registration of the domain names Stahle registered, both Stahle and NSI were bound by the terms of the registration agreement.

Because NSI did not have an unqualified right to cancel or withdraw from the registration agreement, the cases Stahle relies on to show that without mutuality of obligation a contract is illusory, are inapposite. (*Cox v. Hollywood Film Enterprises, Inc.* (1952) 109 Cal.App.2d 320; *Fabbro v. Dardi & Co.* (1949) 93 Cal.App.2d 247.) Those cases stand for the general proposition that where performance of an *existing* contract is optional with one of the parties no enforceable obligation exists. (*Cox*, *supra*, at p. 325; *Fabbro*, *supra*, at p. 251.) But "[a] corollary to that rule exists, . . . An agreement that is otherwise illusory may be enforced where the promisor has rendered at least part performance." (*Money Store Investment Corp. v. Southern Cal. Bank* (2002) 98 Cal.App.4th 722, 728.) NSI performed. It accepted Stahle's registration, and that performance cured any illusory aspect, if one existed, in the registration agreement.

(2) *The Registration Agreement Contained Specific Terms*

Stahle urges the registration agreement does not contain definite terms because it does not state what constitutes an acceptance of the contract. Stahle is wrong. If the domain name is registered in NSI's domain name database and assigned to the registrant, the registration agreement (contract) has been accepted. The registration agreement is clear on what constitutes acceptance.

c. *Stahle Failed to Show that Enforcement of the Forum Selection Clause Would be Unreasonable*

Stahle claims that the enforcement of the mandatory forum selection clause would be unreasonable because Virginia is not a suitable alternative forum.[13] (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 752.) He points out that because NSI delayed in bringing the motion to dismiss, the statute of limitations in the alternative forum "probably already expired." Because Stahle challenged the forum selection clause, he had the burden of showing that its enforcement would be unreasonable. (*Lu v. Dryclean-U.S.A. of California, Inc.*, *supra*, 11 Cal.App.4th at p. 1493.) Stahle failed to meet his burden.

Stahle presented no evidence to establish that Virginia is not a suitable alternative forum. He did not address at the trial court or on appeal whether Virginia does or does not have an unfair business practice cause of action similar to his UCL claim. (See, e.g.,

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[13] We summarily reject Stahle's argument addressing the factors relevant to a forum non conveniens motion. We consider those factors when there is no contractual forum selection clause. (*Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1682-1683.)

Net2Phone, Inc. v. Superior Court, *supra*, 109 Cal.App.4th at p. 590 [forum selection clause enforceable in UCL action where state had comparable cause of action under consumer fraud act].) Moreover, although Stahle argues that NSI's unnecessarily delay in bringing the motion may have caused the statute of limitations to run on his fraud and UCL causes of action, he again cited no statutory authority to support that argument. Thus, based on Stahle's opposition to the motion to dismiss, we can only conclude that Stahle can, but does not want to, bring this lawsuit in Virginia. Accordingly, since Stahle failed to show that enforcement of the forum selection clause would be unreasonable, the trial court did not abuse its discretion in dismissing Stahle's fraud and UCL causes of action.

3. *The Trial Court Did Not Err In Granting Summary Adjudication of Stahle's CLRA Claim*

Abandoning a challenge on the merits, Stahle attacks the trial court's decision to grant summary adjudication in favor of NSI on his CLRA claim on procedural grounds. We independently review a motion for summary judgment and find Stahle's challenge without merit. (*Johnson v. City of Loa Linda.* (2000) 24 Cal.4th 61, 65, 67-68; *Kids Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

Stahle contends that the trial court erred in disposing of this cause of action because Civil Code section 1781, subdivision (c) specifically excludes summary adjudication where, as here, a CLRA action is *commenced* as a class action. Subdivision (c) reads:

"If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:

"(1) A class action pursuant to subdivision (b) is proper.

"(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.

"(3) The action is without merit or there is no defense to the action.

"A motion based upon section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a)."[14]

Stahle focuses on this last paragraph of Section 1781, subdivision (c), claiming summary adjudication is improper. We disagree. This argument ignores the preceding paragraph of that section in which the CLRA expressly provides a statutory basis for summary adjudication.

Even if Code of Civil Procedure section 437c were not the proper statutory basis for the motion, summary adjudication is procedurally proper under Section 1781, subdivision (c)(3). (*Olsen v. Breeze, Inc.* (1996) 48 Cal.App.4th 608, 624.) As noted by NSI in its reply before the trial court, section 1781, subdivision (c)(3) provides a means

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[14] Code of Civil Procedure section 1781, subdivision (a) provides: "Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780."

of resolving CLRA actions prior to trial, as the trial court did here, if the claim has no merit. Accordingly, the trial court could properly adjudicate Stahle's CLRA claim.

Because Stahle has abandoned any challenge to the trial court's ruling on the merits, those issues are waived on appeal. (*1119 Delaware v. Continental Land Title Co.* (1993) 16 Cal.App.4th 992, 1004.) Accordingly, we affirm the trial court's order granting summary adjudication, which, as we have noted, effectively constitutes, under the circumstances presented here, a summary judgment.

DISPOSITION

The trial court's order dated July 17, 2002, denying Stahle's motion for class certification is affirmed (B161499). The trial court's order dated November 15, 2002, granting NSI's motion to dismiss Stahle's UCL and fraud claims, and granting summary adjudication in favor of NSI on Stahle's CLRA claim is affirmed (B164039). NSI is awarded costs on both appeals. However, in order to clarify and correct the record in No. B164039, we remand this matter to the trial court with directions to vacate its order granting summary adjudication and to enter instead an order granting summary judgment, nunc pro tunc.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We Concur:

KITCHING, J.

ALDRICH, J.